

The NLRB is currently experiencing issues that affect several NLRB offices' main line telephone numbers. The problem may affect Regional and HQ office main line numbers. The NLRB OCIO is currently working to resolve the issue. A status update will be provided when repair activities are completed.



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COVID-19 Operational Status Update

Office of Public Affairs

202 273 1991

publicinfo@nrlb.gov

www.nrlb.gov

April 17, 2020

WASHINGTON, DC Due to the coronavirus pandemic emergency, many federal agencies have had to modify their procedures to continue operations safely. The National Labor Relations Board ("NLRB") is no exception. Fortunately, largely due to the outstanding efforts of its staff, the NLRB has continued to operate throughout this emergency with only some modifications to its practices and procedures to ensure the safety of employees, the parties, and the public. Safety for all has been, and will continue to be, of critical importance while we continue the important work of the NLRB. Modifications to our operations have been announced through press releases, which are posted on the NLRB website. The current status of Agency operations is set forth below.

Regional Office Status NLRB regional offices are open. In the interest of safety and social distancing, in person public access has been limited to appointment only. Except for limited essential personnel, all employees are teleworking but continue Agency operations through email and teleconference. At present, the Agency has extensive teleconferencing capabilities but limited video conference capability. Additional access to videoconferencing capacity is being secured.

Regional Office Case Processing Unfair labor practice charges continue to be accepted and investigated. There has also been no change to priority of investigations or time targets. Generally, affidavits will be taken by phone, absent extraordinary circumstances. Complaints continue to issue where appropriate.

Representation Elections Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

Administrative Law Judge Hearings The Division of Administrative Law Judges has ordered that no in-person hearings will be scheduled through May 31, 2020, except for those matters that the presiding judge determines can be held via videoconference. Those hearings that were already scheduled for this time frame have been postponed. Judges are continuing to make conference calls in order to aid in settlement and handling cases that may be stipulated to them by agreement. As noted, the Agency's videoconferencing capacity currently is limited and the Agency is working diligently to increase those capabilities.

Board Case Processing The Board continues to process cases, including exceptions to administrative law judges' decisions, requests for review of regional actions, motions, briefs, and other filings, as usual. As always, parties are required to E-File documents with the Board, and parties are encouraged to sign up for E-Service of Board and ALJ decisions. Any questions regarding filings or cases pending before the Board should be directed to the Executive Secretary.

Implementation of the 2019 Representation Case Rules Implementation of the 2019 amendments to the representation case rules has been extended to May 31, 2020. Public training on the 2019 amendments will be scheduled before the rules are effective.

Implementation of the Election Protection Final Rule The effective date of the Board's Election Protection final rule, covering blocking charges, voluntary recognition, and construction industry recognition, has been postponed to July 31, 2020.

Please consult the NLRB's website for additional information, including individual office status, and for future updates.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of private-sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace actions and investigates thousands of unfair labor practice charges each year.

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News & Publications

Division of Judges Will Resume Trials Effective June 1, 2020

Office of Public Affairs

202 273 1991

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www.nlrb.gov

May 15, 2020

Washington, DC – The National Labor Relations Board Division of Judges announced today that it will resume holding hearings on unfair labor practice complaints effective June 1, 2020. The Division of Judges had previously postponed hearings scheduled for May in light of the COVID 19 pandemic and related federal, state, and local guidance and orders. However, the Agency has since taken the necessary steps to acquire the licenses and equipment needed to conduct such hearings remotely using online videoconferencing technology.

Accordingly, effective June 1, the Division of Judges will not *sua sponte* postpone scheduled hearings due to the COVID 19 pandemic. Rather, prehearing requests for postponement will be considered on a case by case basis by the Deputy Chief Administrative Law Judge in Washington, D.C. and Associate Chief ALJs in New York and San Francisco under Sec. 102.24 of the Board's Rules, subject to the right of the parties to request special permission from the Board to appeal the ruling under Sec. 102.26. Motions or objections with respect to holding an in person versus an online videoconference hearing, or taking particular witness testimony by videoconference, will be considered and ruled on by the designated trial judge pursuant to Sec. 102.35(a)(6) and (8) of the Board's Rules, likewise subject to the parties' special appeal rights under Sec. 102.26.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees and employers, and unions from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

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Section 508

Employee Rights Poster

From: [Aburvasamy, Prem](#)
To: [Aburvasamy, Prem](#)
Subject: Zoom for Government Use Policy
Date: Sunday, July 5, 2020 7:51:30 PM

To All Zoom Hosts:

Zoom for Government Use Policy

The Agency has purchased Zoom for Government licenses primarily for public facing outreach and case related matters use. Zoom for Government services are available to support Agency Mission related activities involving the public such as representation hearings, ALJ hearings, collecting affidavits from witnesses, and other “public facing” meetings and scenarios where Skype will not suffice. Zoom can also be used as a substitute for “in-person” meetings with witnesses, participants, or other persons related to a case.

Within the Agency, Zoom for Government may be used for staff meetings that are agency business/mission related only. However, the Zoom for Government service is not to be used for social event meetings. Skype continues to serve as our primary service for those types of meetings. Zoom for Government may not be used for non-agency related matters or personal use.

Thanks,
Prem.
Prem Aburvasamy | Chief Information Officer
National Labor Relations Board (NLRB)
1015 Half Street SE | Washington, DC 20570
prem.aburvasamy@nrlb.gov | 202-273-3925

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-12

August 25, 2020

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Remote Unfair Labor Practice Hearings During COVID-19 Pandemic

Since the Board created the ability to hold hearings remotely through video conference technology, Regional Offices have been working with the Division of Operations-Management to deal with actual and potential issues that might make conducting such hearings inappropriate. As discussed below, recent Board decisions have now provided guidance on whether to hold hearings by video technology, especially when parties oppose hearings based on inherent limitations with existing technology. Thus, the Board's guidance generally supports the initial scheduling, and holding, of hearings by video conference in most cases.

In *William Beaumont Hospital*, 370 NLRB No. 9 (2020) and *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020), the Board recently granted requests for special permission to appeal – and then denied those appeals on the merits – administrative law judge orders to conduct unfair labor practice hearing entirely by videoconference in view of public health concerns deriving from the current Coronavirus Disease (COVID-19) pandemic. The Board rejected arguments that the COVID-19 pandemic did not constitute “compelling circumstances” warranting remote hearing via video technology and characterized as “speculative” sundry problems parties in those cases predicted would occur.

In light of this guidance from the Board, the ongoing status of the COVID-19 pandemic in the United States, and the significant number of unfair labor practice complaints pending hearing, Regions should move forward in scheduling remote unfair labor practice hearings,¹ including cases in which the complaint has already issued, as long as neither of the following conditions apply:

- The Region believes that unusual aspects of the contemplated trial make video hearing unfeasible;

¹ Effective immediately, Regions do not need Operations-Management approval to move forward with video unfair labor practice hearings; any pending requests for approval that are consistent with the considerations herein are granted.

- There are witnesses the General Counsel wishes to call who do not have access to equipment that will enable a connection to the video technology platform the Agency is using for remote hearings;

Where either of these factors are present, the Region should consult with the Division of Operations-Management.

/s/
P.B.R.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

William Beaumont Hospital and Michigan Nurses Association. Cases 07–CA–244615

August 13, 2020

ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL
AND MCFERRAN

On July 20, 2020, Deputy Chief Administrative Law Judge Arthur Amchan denied the Respondent’s motion requesting that the hearing in the above-captioned case be conducted in person, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote hearing via video technology. Thereafter, in accordance with Section 102.26 of the National Labor Relations Board’s Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge’s July 20 Order. The General Counsel filed a response, taking no position.

Having duly considered the matter, we grant the Respondent’s request for permission to file a special appeal, but we deny the appeal on the merits. For the reasons discussed below, we find that the Respondent has failed to establish that the judge abused his discretion in finding that good cause for a video hearing exists under the circumstances here, and that the Respondent has not shown that a hearing held by videoconference would deny it due process. To the extent the Respondent has nonspeculative concerns that arise during the course of the video hearing, it may raise them to the trial judge in the first instance, without prejudice to its right to file exceptions with the Board to any adverse rulings pursuant to Section 102.46 of the Board’s Rules and Regulations.

In *Morrison Healthcare*, 369 NLRB No. 76 (2020), the Board recently found that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote preelection hearing in a representation case. In so finding, the Board looked to Section 102.35(c) of the Board’s Rules and Regulations,

which permits a witness in an unfair labor practice case to testify by video. The Board imported the general Section 102.35(c) framework to representation cases, allowing for videoconference hearings “on a showing of good cause based on compelling circumstances and under appropriate safeguards.” *Morrison*, 369 NLRB No. 76, slip op. at 1.

We find that the judge did not err in following that same approach in this unfair labor practice proceeding. Even before the Board promulgated Section 102.35(c), it permitted testimony by videoconference in unfair labor practice cases, finding that video can adequately address parties’ concerns with “the judge and the parties being able to observe the witness for credibility, due process, and other reasons.” *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn.1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017). This is consistent with Section 102.35(c), which contemplates the taking of a single witness’s testimony via video transmission during an in-person hearing, even though Section 102.35(c) is not controlling in a hearing conducted entirely by videoconference. *Morrison*, 369 NLRB No. 76, slip op. at 1 fn.2.

Notwithstanding this precedent, the Respondent claims that the judge’s order abrogates its absolute right to an in-person hearing under the Board’s Rules and Regulations. We disagree. Section 102.38 of the Board’s Rules and Regulations, on which the Respondent primarily relies, provides that “[a]ny party has the right to appear at the hearing in person, by counsel, or by other representative” The right to appear in person is the right to appear at a hearing *at all*, not the right to be physically present in a hearing room. See *Dixon v. Love*, 431 U.S. 105, 113–114 (1977) (using the phrase “the right to appear in person” to denote the right to a hearing to contest an administrative action). Moreover, examining the “right to appear . . . in person” in context alongside the right to appear “by counsel” or “by other representative,” it becomes clear that phrase further guarantees the right to proceed at the hearing *pro se*.¹ We find nothing in the Board’s Rules, or the Act, that precludes a judge or Regional Director from ordering a videoconference hearing in an unfair labor practice case, on a showing of good cause based on compelling circumstances and under appropriate safeguards.²

¹ Cf. *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1625 (2018) (where “a more general term follows more specific terms in a list, the general term is usually understood to ‘embrace only objects similar in nature to those objects enumerated by the preceding specific words’”) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

² To the extent the Respondent advances a vague constitutional claim, courts have consistently rejected arguments that the Fifth Amendment’s Due Process Clause *per se* precludes conducting administrative hearings via videoconference. See *Vilchez v. Holder*, 682 F.3d 1195, 1199–1200 (9th Cir. 2012) (immigration proceeding); *Toyama v. Leavitt*, 408 Fed. Appx. 351, 353 (Fed. Cir. 2010) (MSPB proceeding); *Pokluda v. Colvin*,

2014 WL 1679801, at *4 (N.D.N.Y. Apr. 28, 2014) (unpublished) (Social Security Administration hearing). Moreover, we note that a handful of district courts, referencing Rule 102.35(c)’s federal counterpart (FED R. CIV. P. 43(a)), have opted to conduct bench trials remotely via videoconference technology in light of the ongoing pandemic. *Gould Electronics Inc. v. Livingston County Road Commission*, No. 17-11130, -- F. Supp. 3d --, 2020 WL 3717792 (E.D. Mich. June 30, 2020); *Argonaut Insurance Co. v. Manetta Enterprises, Inc.*, No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033 (E.D.N.Y. June 11, 2020); *RFC & ResCap Liquidating Trust Action*, No. 13-CV-3451 (SRN/HB), -- F. Supp. 3d --, 2020 WL 1280931 (D. Minn. Mar. 13, 2020).

We further reject the Respondent's suggestion that the "compelling circumstances" (i.e., the ongoing Coronavirus Disease (COVID-19) pandemic) justifying a remote hearing in *Morrison*, and relied on by the judge here, are no longer compelling. The Respondent claims that the Board has conducted a handful of onsite representation elections since *Morrison*, and the Division of Judges has since "contemplate[d]" in-person hearings. But even if the Board has conducted some of its business in-person since the *Morrison* decision issued, that does not invalidate the judge's conclusions about holding an in-person hearing in this witness-heavy case. Additionally, the judge did not abuse his discretion in recognizing that a postponement until an in-person hearing is feasible may result in an indefinite delay of this case, a serious concern here, as the Respondent is alleged to have committed numerous Section 8(a)(3) and (1) violations during an organizing campaign.

We also find that the judge did not abuse his discretion in directing the trial judge to impose appropriate safeguards informed but not controlled by those listed in Section 102.35(c)(2) of the Board's Rules. As noted above, that direction is consistent both with *Morrison*, 369 NLRB No. 76, slip op. at 1 fn. 2, where we found that Section 102.35(c)(2)'s safeguards do not apply in all respects to a hearing conducted entirely via videoconference, and with Section 102.35(a)(6), which authorizes the trial judge to "regulate the course of the hearing."

Section 102.121 of the Rules and Regulations instructs us to "liberally construe[]" the rules "to effectuate the purposes and provisions of the Act." Here, recognizing judges' discretion to order videoconference hearings in unfair labor practice cases, upon good cause based on compelling circumstances and under appropriate safeguards, directly advances the Act's central goal of resolving unfair labor practice disputes without inordinate delay.

The Respondent's list of sundry problems that could occur during the video hearing is premature. The Respondent worries that the video technology will compromise the trial judge's ability to assess witness demeanor; prejudice

the Respondent's ability to examine and cross-examine witnesses; create issues with introducing documentary evidence; result in delays in witness availability; suffer from witnesses' inability to access suitable technology; and/or be beset with technical glitches. Those concerns are, at this stage, speculative. Further, the Respondent fails to show that advances in current videoconferencing technology will not be able to address many, if not all, of its procedural concerns. Certainly, the trial judge has the discretion to determine whether the case is too complex; cumbersome; or witness-, document-, and fact-heavy to be heard remotely. And, to the extent the Respondent has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pre-trial accommodations or stipulations among the parties, the Respondent may raise it to the trial judge in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, in the event the Respondent receives an adverse ruling.

Dated, Washington, D.C. August 13, 2020

John F. Ring,	Chairman
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Marvin E. Kaplan,	Member
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William J. Emanuel	Member
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Lauren McFerran	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

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XPO Cartage, Inc. and International Brotherhood of Teamsters. Cases 21–CA–150873, 21–CA–164483, 21–CA–175414, and 21–CA–192602

August 20, 2020

ORDER¹

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 14, 2020, Administrative Law Judge Christine E. Dibble issued an Order requiring that the supplemental hearing in the above-captioned case be conducted by videoconference, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote hearing via videoconference. Thereafter, in accordance with Section 102.26 of the Board’s Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge’s July 14 Order. The Charging Party filed a response in support of the special appeal, and the General Counsel filed a response taking no position.

Having duly considered the matter, we grant the Respondent’s request for permission to file a special appeal, but we deny the appeal on the merits. For the reasons discussed below, and as set forth more fully in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), we find that the Respondent has failed to establish that conducting the hearing via videoconference would deny it due process. To the extent that a party has nonspeculative concerns that arise during the course of the video hearing, it may raise them to Judge Dibble in the first instance, without prejudice to its right to file exceptions with the Board to any adverse rulings pursuant to Section 102.46 of the Board’s Rules and Regulations.

Initially, we reject the Respondent’s assertion that proceeding with a videoconference hearing threatens the parties’ due process or other cognizable rights. As discussed at greater length in *William Beaumont Hospital*, nothing in the Constitution, the Act, nor the Board’s Rules and Regulations *per se* prohibit holding an unfair labor practice hearing via videoconference technology.

William Beaumont Hospital applied the framework of Section 102.35(c) to permit a hearing via videoconference “[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards.” The Respondent dismissively characterizes the judge’s

order as based on “convenience or expediency.” However, accommodations driven by the worst public health crisis in the last century are more than mere convenience, and the Respondent has failed to establish that the Board should not construe the pandemic as a compelling circumstance. See *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 2 (2020) (“[T]he current Coronavirus Disease (COVID 19) pandemic constitutes ‘compelling circumstances’ warranting a remote preselection hearing.”). Moreover, continuing the case until circumstances no longer compel a video hearing could result in an indefinite delay in the proceeding, given the uncertain forecast for the ongoing pandemic.

Likewise, there is no merit to the Respondent’s contention that Section 102.35(c) precludes the judge from directing a videoconference hearing, absent a party’s request pursuant to Section 102.35(c)(1). While Section 102.35(c)(1) provides one avenue for the judge to permit remote witnesses to testify, it is not the only one. *Morrison*, slip op. at 1, fn. 2, counsels that Section 102.35(c), while instructive, is not controlling in a hearing conducted entirely by videoconference. Further, we explained in *William Beaumont Hospital* that judges enjoyed discretion to order a videoconference hearing in appropriate circumstances pursuant to their authority to “regulate the course of the hearing” under Section 102.35(a)(6) of our rules. And, to the extent the judge’s action is in tension with Section 102.35, or any other Board rule or regulation, the Board is permitted to apply its rules flexibly to meet the demands of a given case. See *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950) (“The Board is not the slave of its rules.”); Section 102.121 of the Board’s Rules and Regulations (stating that the Board will “liberally construe[]” its rules “to effectuate the purposes and provisions of the Act”).

It appears that the Respondent’s primary concern is that a videoconference hearing will impair the judge’s ability to engage in nuanced credibility determinations, particularly because many of the witnesses will require Spanish-speaking translators. In addition, the Respondent anticipates that the inherent time delay caused by video technology will create substantial difficulties. The Charging Party advances similar concerns, and it additionally argues that video technology raises the possibility of witness tampering through means undetectable to other parties; impedes a witnesses’ review of pertinent documents; suffers from a witness’s potential inability to access suitable technology; and/or will be beset with technical glitches.

Those concerns of both parties are, at this stage, speculative. Further, no party has shown that advances in current videoconferencing technology will not be able to

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

address many, if not all, of their procedural concerns. Certainly, Judge Dibble has the discretion to determine whether the case is too complex; cumbersome; or witness document-, and fact-heavy to be heard remotely.² And, to the extent that any party to the proceeding has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties, any party may raise it to Judge Dibble in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event the party receives an adverse ruling.

Dated, Washington, D.C. August 20, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² Thus, if the judge finds herself unable to make credibility determinations in a video environment, she has the discretion to handle the situation accordingly.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE BOEING COMPANY

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO**

**Cases 10-CA-204795
10-CA-226718
10-CA-227191
10-CA-229378
10-CA-229979
10-CA-231035
10-CA-231815
10-CA-231853
10-CA-231888
10-CA-232626
10-CA-233509
10-CA-234519
10-CA-245435**

ORDER¹

The Respondent's request for special permission to appeal from Administrative Law Judge Geoffrey Carter's August 4, 2020 Order directing the hearing to be conducted by videoconference is granted. On the merits, the appeal is denied.

The Respondent argues that the General Counsel has failed to submit a written application seeking a videoconference hearing in accordance with Section 102.35(c) of the Board's Rules and Regulations and that such a hearing without all of the safeguards required by that Section would deny it due process. The Board has found that the ongoing COVID-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1 (2020); *Morrison Healthcare*, 369 NLRB No. 76,

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 fn. 2. A video hearing can also provide for the observation of witnesses for the purpose of credibility determinations, as well as adequately address other due process concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017). Therefore, we find that the Respondent's speculative concerns are premature and may be raised with the judge in the first instance if warranted, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event it receives an adverse ruling. Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused his discretion.²

Dated, Washington, D.C., August 31, 2020.

JOHN F. RING

CHAIRMAN

MARVIN E. KAPLAN

MEMBER

WILLIAM J. EMANUEL

MEMBER

² On August 17, the Respondent filed a statement of supplemental authority bringing *William Beaumont Hospital*, 370 NLRB No. 9 (2020), to the Board's attention. Under Board rules, statements of supplemental authority are limited to 350 words and should be submitted via letter to the Executive Secretary. *Reliant Energy*, 339 NLRB 66, 66 (2003). Respondent's statement, however, runs over 2000 words and takes the form of a legal brief. It is therefore not in compliance with the Board's requirements, and we strike it as improperly filed.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 675 OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING & PIPE FITTING INDUSTRY OF THE
UNITED STATES & CANADA

and

Case 20-CB-251372

RPS MECHANICAL, INC.

ORDER¹

The Respondent's request for special permission to appeal from Administrative Law Judge Eleanor Laws' July 30, 2020 Order directing the hearing to be conducted by videoconference is granted. On the merits, the appeal is denied.

The Respondent argues that a videoconference hearing is not permitted under Section 102.35(c) of the Board's Rules and Regulations and that such a hearing would be without all of the safeguards required by that Section. The Board has found that the ongoing COVID-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1 (2020); *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 fn. 2.

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

A video hearing can also provide for the observation of witnesses for the purpose of credibility determinations, as well as adequately address other due process concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017). Therefore, we find that the Respondent's speculative concerns are premature and may be raised with the judge in the first instance if warranted, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event it receives an adverse ruling. Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused her discretion.

Dated, Washington, D.C. September 4, 2020

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OXARC, INC.,

and

TEAMSTERS LOCAL 839 ,

and

TEAMSTERS LOCAL 690,

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

and

JARED FOSTER, an individual.

**Cases 19-CA-230472
19-CA-237336
19-CA-273499
19-CA-238503
19-CA-232728
19-CA-248391**

ORDER¹

The Respondent's request for special permission to appeal from Administrative Law Judge Ariel L. Sotolongo's August 3, 2020, denial of its Motion to postpone the hearing until it could be conducted in person is granted. On the merits, the appeal is denied.

The Respondent argues that conducting a virtual hearing would infringe upon the Respondent's due process rights, there is no good cause showing for a virtual hearing, the ALJ has not protected the integrity of the hearing under Section 102.35(c) of the Board's Rules and Regulations, virtual hearings require procedural mandates that go

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

beyond what is required by the rules, and the virtual hearing undermines the requirement that hearings be available to the public. The Respondent also contends that the General Counsel and the Charging Party are not prejudiced by a delay.

The Board has found that the ongoing COVID-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1 (2020); *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1, fn. 2. A video hearing can also provide for the observation of witnesses for the purpose of credibility, as well as other due process concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1, fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017).

We find that the judge did not abuse his discretion in ordering a video hearing here. Although the Respondent particularly emphasizes the complexity and number of exhibits involved in this case, this concern has already been addressed by the Board. As the Board recognized in *William Beaumont Hospital*:

[T]he trial judge has the discretion to determine whether the case is too complex; cumbersome; or witness-, document-, and fact-heavy to be heard remotely. And, to the extent the Respondent has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties, the Respondent may raise it to the trial judge in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, in the event the Respondent receives an adverse ruling.

The Respondent also asserts that the judge's procedural request to upload documents that can be viewed by the other side prior to the hearing violates Board procedures. To begin, we note that the Respondent failed to object to this procedure in response to the judge's July 20, 2020 Pre-hearing Order or at the parties' prehearing conference on July 27, 2020. Furthermore, we decline to find that the judge abused his discretion when the Respondent failed to ask the judge for an alternate method for uploading documents, such as to a private folder. Finally, although the Respondent argues that the parties are not prejudiced by a delay, this does not mean that the judge erred in making his determination to proceed via Zoom.

Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused his discretion.

Dated, Washington, D.C., September 23, 2020.

MARVIN E. KAPLAN	MEMBER
WILLIAM J. EMANUEL	MEMBER
LAUREN McFERRAN	MEMBER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK PAVING, INC.

and

Case 29-CA-254799

CONSTRUCTION COUNCIL LOCAL 175,
UTILITY WORKERS UNION OF AMERICA,
AFL-CIO

ORDER

On July 27, 2020, Administrative Law Judge (“ALJ”) Lauren Esposito issued an Order requiring that the hearing in the above-captioned case be conducted by videoconference, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote hearing via videoconference. Thereafter, in accordance with Section 102.26 of the Board’s Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge’s Order. The General Counsel filed a response opposing the motion.

Having duly considered the matter, we grant the Respondent’s request for permission to file a special appeal, but we deny the appeal on the merits.¹ For the reasons discussed below, and as set forth more fully in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), we find that the Respondent has failed to establish that conducting the hearing via videoconference would deny it due process.

The Respondent argues that a videoconference hearing is not permitted under Section 102.35(c) of the Board’s Rules and Regulations and that such a hearing would be without all of

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

the safeguards required by that Section and thus deny it due process. The Board has found that the ongoing COVID-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 fn. 2. A video hearing can also provide for the observation of witnesses for the purpose of credibility determinations, as well as adequately address other due process and procedural concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020). Therefore, we find that the Respondent's speculative concerns are premature and may be raised with the judge in the first instance if warranted, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event it receives an adverse ruling. Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused her discretion.

Dated, Washington, D.C., October 8, 2020.

Marvin E. Kaplan	Member
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William J. Emanuel	Member
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Lauren McFerran	Member
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(SEAL)

NATIONAL LABOR RELATIONS BOARD